

Opinion issued September 22, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-11-00474-CV

IN RE BARBARA VILLASANTA, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator, Barbara Villasanta, petitions for mandamus relief from the trial court's order disqualifying attorney Lorri Meraz Grabowski from representing Barbara in the underlying divorce case.¹

¹ The underlying case is *In the Matter of the Marriage of Ricaurte Villasanta and Barbara Villasanta and In the Interest of D.A.V. and C.I.V., Children*, No. 2009-78240, in the 257th District Court of Harris County, Texas, the Honorable Judy Warne presiding.

Background

Barbara's husband, Ricaurte Villasanta, filed a petition for divorce. Barbara and Ricaurte have two adopted children. For some time during the divorce proceedings, the children were placed in the custody of Child Protective Services. Barbara, asserting that the children's needs were not being met in their foster home, moved to modify the children's CPS placement. Her attorney, Grabowski, verified that motion, swearing that the facts stated in it were "true and correct to the best of [her] knowledge."

Ricaurte responded to the motion by seeking Grabowski's disqualification on the ground that her verification of the facts stated in the motion made it "reasonable to assume" that she would be a witness in the case and precluded her from representing Barbara. Ricaurte's request for disqualification was not accompanied by any supporting evidence or specific allegations as to the essential facts that required Grabowski's testimony. Barbara disputed that Grabowski was a necessary witness and presented the trial court with other evidence supporting the facts stated in the motion, including Barbara's own affidavit, the affidavit of the children's foster mother, and the affidavit and report of the guardian ad litem. After considering Barbara's and Ricaurte's arguments at an oral hearing, the trial court disqualified Grabowski.

Discussion

Standard of Review

“Mandamus is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal.” *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004).

Attorney Disqualification

When a lawyer is or may be a witness necessary to establish an essential fact, Texas Disciplinary Rule of Professional Conduct 3.08 prohibits the lawyer from acting as both an advocate and a witness in an adjudicatory proceeding. *See* TEX. DISCIPLINARY R. PROF’L CONDUCT 3.08(a). Rule 3.08 was “promulgated as a disciplinary standard rather than one of procedural disqualification, but [Texas courts] have recognized that the rule provides guidelines relevant to a disqualification determination.” *See Sanders*, 153 S.W.3d at 56 (citing *Anderson Producing Inc. v. Koch Oil Co.*, 929 S.W.2d 416, 421 (Tex. 1996)).

“Disqualification is a severe remedy.” *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990). It can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice. *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002). Consequently, in considering a motion to disqualify, the district court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory tactic.

Spears, 797 S.W.2d at 656; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 cmt. 10 (stating that a lawyer "should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness"). "Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice" to merit disqualification. *Spears*, 797 S.W.2d at 656.

It is only appropriate to disqualify an attorney due to her status as a potential witness if the attorney's testimony is "necessary to establish an essential fact." TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a); *Sanders*, 153 S.W.3d at 57. The fact that a lawyer serves, or may serve, as both an advocate and a witness does not in itself compel disqualification. *See Ayres v. Canales*, 790 S.W.2d 554, 557–58 (Tex. 1990); *In re Chu*, 134 S.W.3d 459, 464 (Tex. App.—Waco 2004, orig. proceeding); *May v. Crofts*, 868 S.W.2d 397, 399 (Tex. App.—Texarkana 1993, orig. proceeding). Rather, the party requesting disqualification must demonstrate that the opposing lawyer's dual roles as attorney and witness will cause the party actual prejudice. *Ayres*, 790 S.W.2d at 558; *see also In re B.L.H.*, No. 01-06-00817-CV, 2008 WL 864072, at *3 (Tex. App.—Houston [1st Dist.] Mar. 27, 2008, orig. proceeding).

Here, Ricaurte seeks to disqualify opposing counsel based on her verification of a motion to modify the children's CPS placement. Ricaurte asserts that by verifying that the facts stated in the motion were true and correct to the best

of her knowledge, Grabowski made herself a witness in the case, and it is reasonable to assume she will testify. But Ricaurte did not show that Grabowski's testimony is necessary to establish any essential fact. *Sanders*, 153 S.W.3d at 57. His assertions as to the necessity of Grabowski's testimony were made without any specific reference to essential facts, and the record shows various other sources of the same information that Grabowski stated in her verified motion. *See id.* at 57–58 (rejecting argument that attorney disqualification was required where same information could be obtained from other sources). The foster mother and the guardian ad litem both addressed, by affidavit, the emotional and physical well-being of the children in their CPS placement. The record also suggests that Barbara herself could testify to some of the facts that motivated her decision to seek a new CPS placement for the children. We are not persuaded that Grabowski's mere verification of facts under these circumstances precludes her from continuing to serve as Barbara's attorney. We also note that Ricaurte made no showing of prejudice or harm relating to Grabowski's continued representation of Barbara. *See id.* (citing *Ayres*, 790 S.W.2d at 558). We hold that Ricaurte's request did not meet the exacting standards by which motions to disqualify opposing counsel must be judged, and the trial court's order disqualifying Grabowski from serving as Barbara's attorney constitutes an abuse of discretion for which there is no adequate remedy by appeal. *See Sanders*, 153 S.W.3d at 56.

Conclusion

We direct the trial court to vacate its order disqualifying Grabowski from representing Barbara in the underlying divorce proceedings. Our writ of mandamus will issue only if the trial court does not comply.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.